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| Matter of Batterbee |
| 2015 NY Slip Op 31296(U) |
| March 31, 2015 |
| Sur Ct, Nassau County |
| Docket Number: 2010-360684/D |
| Judge: Edward W. McCarty III |
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SURROGATE'S COURT OF THE STATE OF NEW YORK
 COUNTY OF NASSAU

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 Accounting by Jeffrey DeLuca as the Administrator of
 the Estate of

File No. 2010-360684/D

HARRY J. BATTERBEE
 a/k/a HARRY JOSEPH BATTERBEE, SR.,

Dec. No. 30667

Deceased.

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 This is the first and final account of the Public Administrator as administrator of the estate of Harry J. Batterbee. The Public Administrator seeks approval of attorney fees, accounting fees and commissions. The Public Administrator also seeks settlement of his account and the discharge of the surety. The court must also set the fee of the guardian ad litem.

The decedent, Henry J. Batterbee, died on April 27, 2010. Letters of administration issued to the Public Administrator on January 4, 2012. The decedent was survived by a daughter, Linda Brescia, two sons, Henry Batterbee, Jr. and Michael Batterbee, Sr., and by two minor grandchildren, children of a predeceased daughter. A guardian ad litem was appointed for the benefit of the minor grandchildren.

The accounting covers the period April 27, 2010 through May 21, 2013. The summary statement shows charges to the accounting party of \$591,395.97 and credits of \$99,551.46, leaving a balance on hand of \$491,844.51.

The guardian ad litem has filed her report wherein she recommends approval of the account.

With respect to the issue of attorneys' fees, the court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate (*Matter*

of Stortecky v Mazzone, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; *see Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the court cannot apply a selected few factors which might be more favorable to one position or another, but must strike a balance by considering all of the elements set forth in *Matter of Potts*, (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept

1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express

deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

With respect to accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 28, col 2 [Sur Ct, Suffolk County]). The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [1938]). "[T]he purpose of this rule is to avoid duplication. Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee" (Warren's Heaton on Surrogate's Court Practice §93.08 [7th ed], citing *Matter of Schoonheim*, 158 AD2d 183 [1st Dept 1990] and *Matter of Tortora*, NYLJ, July 19, 1995, at 26, col 2 [Sur Ct, New York County]).

Counsel for the Public Administrator has filed an affidavit of extraordinary services seeking a fee of \$26,010.42 and disbursements of \$15.00 for a total of \$26,025.42, plus an additional \$3,900.00 for anticipated services. According to counsel, the services performed were extraordinary requiring an eviction, dealing with numerous claims and issuing subpoenas to obtain records. The services specifically performed include services performed in connection with the eviction proceeding; work in connection with claims, including claims by family members; reviewing correspondence; appearances and participation at conferences; drafting

subpoenas; preparing the accounting; preparing for and attending real estate closing; preparing memorandum of law regarding priority of creditors' claims; communicating with counsel for various beneficiaries; preparing related court papers in connection with accounting; communicating with the guardian ad litem; and reviewing the guardian ad litem's report. Considering all of the factors used to determine the reasonableness of fees, counsel's fee for services provided and anticipated services is fixed in the amount of \$28,000.00.

The accountant has submitted an affidavit of tax services. The accountant seeks a fee of \$3,687.50, of which \$2,437.50 has been paid and \$1,250.00 remains unpaid. The accountant prepared fiduciary income tax returns for the years ending March 31, 2011 through March 31, 2014. A return will also have to be prepared for the year ending March 31, 2015. The accountant's fee appears reasonable, and the services were not duplicative of the services performed by counsel. Accordingly, the fee of the accountant is approved in the amount of \$3,687.50.

The guardian ad litem spent a total of 7.50 hours at an hourly rate of \$250.00 per hour. The guardian ad litem reviewed the file, drafted her report and communicated with counsel for the Public Administrator. The time spent by the guardian ad litem includes some time preparing her affirmation of legal services, which is not compensable (*Matter of Gallagher*, NYLJ, Feb. 2, 993, at 26, col 3 [Sur Ct, Bronx County]). The court fixes the fee of the guardian ad litem in the amount of \$1,750.00. The fee of the guardian ad litem shall be paid within thirty (30) days of the decree to be entered herein.

Commissions are approved subject to audit.

In all other respects, the accounting is approved.

The Public Administrator shall file an affidavit bringing the account down to date within thirty (30) days of the date of this decision and settle a decree. The decree shall discharge the surety.

Settle decree.

Dated: March 31, 2015

EDWARD W. McCARTY III
Judge of the
Surrogate's Court